

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)
)
Amendment of Section 69.2(m))
and (ee) Of The Commission's)
Rules To Include Independent)
Public Payphones Within The)
"Public Telephone" Exemption)
From End User Common Line)
Access Charges)

RM No. _____

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

To: The Commission

PETITION FOR RULEMAKING OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL, INC.

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SUMMARY

APCC petitions the Commission to amend its rules to eliminate the discrimination that exists between the assessment of end user common line ("EUCL") charges on independent public payphones ("IPPs") as opposed to local exchange carrier-provided public pay telephones ("LECPPs") by eliminating the assessment of EUCL on IPPs under the Commission's current access charge rules. These charges are not assessed by local exchange carriers ("LECs") on LECPPs. Instead, LECPP costs are recovered through the carrier common line ("CCL") charge. To the best of APCC's knowledge, all LECs continue to bill IPP providers for EUCL charges instead of recovering IPP line costs from the CCL charge, as they do for their own phones. To end this blatantly unjust and grossly discriminatory practice, the Commission should amend its access charge rules so that all public payphones are treated equally for purposes of EUCL charges.

Although the current rules exempt public payphones from EUCL charges, the Commission recently determined that the exemption applies only to LECPPs and not to IPPs. However, IPPs did not exist when the Commission's access charge rules were originally adopted. The LECs were then the sole providers of pay telephone service. IPP providers have since been authorized to enter the market and are making payphones available to the general public. When the circumstances justifying an original Commission rule or policy have changed, the Commission is obligated to rescind or modify its rules to conform with the changed circumstances.

The specific rule changes that APCC requests are: (1) to include IPPs within the definition of "public telephone" found in

Section 69.2(ee) of the rules, 47 C.F.R. § 69.2(ee), and (2) to clarify that operators of such phones will not be deemed "end users" under the definition of that term in Section 69.2(m), 47 C.F.R. § 69.2(m). The policy considerations that led the Commission to exclude "public payphones" from EUCL charges apply as strongly to IPPs as to LECPPs. In both cases, the payphone line is not dedicated to any particular end user, but to the public at large. Thus, the Commission's underlying policy rationale, as well as the access charge rules themselves, provide support for exempting IPPs from EUCL charges.

Moreover, the rule change requested by APCC is necessary to eliminate discriminatory application of access charges. The LECs' practice of assessing EUCL charges on IPPs instead of recovering those costs from the CCL charge, as is done for LECPPs, is blatantly discriminatory and contrary to the Commission's access charge policies and Section 202 of the Communications Act. 47 U.S.C. § 202. The current rules, as applied by the Commission, sanction this unjust discrimination. Therefore, the Commission should amend its rules to bring them into conformity with its prior policy pronouncements on non-discriminatory access charges and with the fundamental prohibition against discrimination as provided in the Act.

Amending the rules as APCC requests will not prevent local exchange carriers from recovering the non-traffic sensitive costs which are currently recovered improperly from IPP providers by means of EUCL charges. Those costs would be assigned to the CCL

charge, the same charge which is currently used to recover the costs of LECPP lines.

For the foregoing reasons, the Commission should amend its rules so that EUCL charges cannot be assessed on independent public payphones.

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To: The Commission

**PETITION FOR RULEMAKING OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL, INC.**

The American Public Communications Council, Inc. ("APCC") hereby petitions the Commission to amend its rules so that end user common line ("EUCL") charges are not be assessed on independent public payphones ("IPPs").^{1/} Instead, the costs associated with IPP lines should be recovered through the carrier common line ("CCL") charge, just as the costs of the public payphones provided by the local exchange carriers ("LECs") are recovered from that charge. The specific rule changes that APCC requests are: (1) to include IPPs within the definition of "public telephones" under Section 69.2(ee) of the rules, 47 C.F.R. § 69.2(ee), and (2) to clarify that operators of such phones will not be deemed "end users" under

^{1/}IPPs are payphones that are not owned by a local exchange carrier ("LEC"). The Commission has referred to IPP providers in past proceedings as "competitive payphone owners," or "PPOs." Other phrases and associated acronyms have been used to refer to IPP providers such as "customer-owned coin-operated telephone" ("COCOT") providers, "customer-owned pay telephone" ("COPT") providers, and "private payphone providers."

the definition of that term in Section 69.2(m), 47 C.F.R. § 69.2(m).^{2/}

STATEMENT OF INTEREST

APCC is a trade association composed of over one thousand operators and distributors of pay telephone equipment. APCC's purpose is to represent the interests of its members and of the public in having the most widely available, lowest cost, highest quality public communications services. In furthering those interests, APCC's primary objective is to promote full and fair competition in the market for public telephone equipment and services. Members of APCC, as well as other independent public payphone providers, have been billed for EUCL charges by the LECs. Therefore, APCC and its members have a direct and substantial interest in the subject of this petition.

^{2/}On April 21, 1989, APCC filed a Petition for Declaratory Ruling that end-user common line access charges may not be assessed on IPP lines. That petition is still pending at the Commission. The instant rulemaking petition is being filed in response to the Commission's decision in C.F. Communications Corporation v. Century Telephone of Wisconsin, Inc., et al., FCC 95-351 (released September 6, 1995). Nothing herein should be construed to prejudice or otherwise compromise any position that APCC has taken in its earlier Petition for Declaratory Ruling.

BACKGROUND

When the Commission's access charge rules were first devised,^{3/} the Commission decided that local loops connected to public telephone equipment should not be subject to the EUCL charge. First Reconsideration Order, 97 FCC 2d at 703-05. At that time, public telephone service was provided exclusively by the LEC with a monopoly franchise for local telephone service to a given community. Since then, however, the Commission has authorized the interconnection of public telephone equipment provided by other entities,^{4/} and numerous companies have entered the market to provide public telephone equipment and service. These new entrants, referred to herein as "independent public payphone ("IPP") providers," make their equipment available for the same purposes as the public telephones provided by the local exchange carrier -- namely, for access to the telecommunications network by transient members of the public.

Entry, rates and other conditions of IPP providers' service are subject to regulation in virtually all states. In many states, IPP providers must obtain a certificate of public convenience and necessity and operate as an authorized "telephone company" under state law. See, e.g., Fla. Stat. § 364.002(4). In short, IPP

^{3/}MTS and WATS Market Structure, Third Report and Order, 93 FCC 2d 241 (1983) ("Access Charge Order"), recon., 97 FCC 2d 682 (1983) ("First Reconsideration Order"), further recon., 97 FCC 2d 834 (1984), aff'd in principal part and rev'd in part, NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1224 (1985).

^{4/}Registration of Coin Operated Telephones, 57 RR 2d 133 (1984).

providers act as public utilities or common carriers in holding themselves out to serve the communication needs of the general public, and they are regulated as such.

Like LEC-provided public payphones ("LECPPs"), independent public payphones are placed in a wide variety of locations, including sidewalks and government buildings, busy commercial locations such as airports, hotels, and shopping malls, and less busy locations such as remote gasoline stations and rural "mom-and-pop" stores. The general practice is for an IPP provider to retain ownership and control of the public payphone and to place the phone at a location under an agreement to remit to the premises owner some portion of the revenues earned.^{5/} In this respect, too, IPP providers operate in a similar fashion to LECs, which also own and operate public payphones pursuant to commission agreements with premises owners. In both cases, the public payphone is provided for the use of the public, not the premises owner.

EUCL charges are not assessed on lines connected to LECPPs. Instead, LEC public payphone costs are recovered through the CCL charge. Despite the similarities between the two classes of public payphones, LECs are billing IPP providers for EUCL charges rather than recovering those charges through the CCL charge, as they do for their own phones. As a result, there have been disputes between IPP providers and LECs over whether IPPs are legally subject to the EUCL charge even though the same charge is not

^{5/}Some premises owners do own and operate the payphones on their premises.

assessed on LECPPs. Some IPPs have refused to pay EUCL charges, and numerous complaints have been filed at the Commission.

One case, C.F. Communications Corporation v. Century Telephone of Wisconsin, Inc., et al., FCC 95-351 (released September 6, 1995) ("CFC MO&O"), was recently decided by the Commission in favor of the LECs. The Commission upheld an earlier decision by the Common Carrier Bureau^{5/} which concluded that the IPP provider was an "end user" as defined by Section 69.2(m), and that IPPs do not fall within the public payphone exception to the EUCL charges because IPPs are not "public telephones" defined by Section 69.2(ee).

That section defines "public telephone" as a "telephone provided by a telephone company through which an end user may originate interstate or foreign telecommunications for which he pays with coins or by credit card, collect or third number billing procedures." CFC MO&O at ¶ 19. A "telephone company," the Commission further stated, is by definition an entity that provides local exchange service. Id. Because IPP providers do not provide local exchange services, the Commission held that IPPs could not be "public telephones" under Section 69.2(ee). Id.

The Commission recognized that "the payphone industry has changed over the past decade because of the introduction of payphones that are not owned by telephone companies. . . ." Id. at ¶ 20. However, the Commission nonetheless found that, because of the "unambiguous definition in [its] rules," a rulemaking

^{5/}C.F. Communications Corp. v. Century Tel. of Wisc., 8 FCC Rcd 7334 (Com. Car. Bur. 1993) ("CFC Bureau Order").

proceeding rather than a complaint is the proper forum for addressing the inequity of the literal definition. Id. at ¶ 20. "We must apply our rules as they are now defined," the Commission stated. Id. "The [IPP providers'] arguments essentially advocate a rule change, not a rule interpretation." Id.

APCC now seeks that rule change. As discussed below, the rationale for recovering the costs of LECPPs from CCL charges rather than from EUCL charges applies equally to IPPs. The rules as currently written are blatantly discriminatory and must be changed.

I. THE COMMISSION'S RATIONALE FOR RECOVERING THE COSTS OF LEC-PROVIDED PUBLIC PAYPHONES FROM CCL CHARGES RATHER THAN FROM EUCL CHARGES APPLIES EQUALLY TO INDEPENDENT PUBLIC PAYPHONES.

The policy reasons for the Commission's decision to exclude LECPPs from EUCL charges, and instead recover those costs from CCL charges, apply as strongly to IPPs -- which did not exist when the Commission first adopted its access charge rules -- as to the LECPPs which did exist at the time of adoption.

At an early stage of its access charge rulemaking, the Commission recognized that it would not be feasible to apply EUCL charges to public pay telephones. First Reconsideration Order, 97 FCC 2d at 703-04. The purpose of the end user access charge is to recover the cost of an exchange loop from the subscriber who uses that loop to make or receive telephone calls:

The cost of a common line is attributable to the user who has that line, which is dedicated to his use and which remains available for his exclusive use in sending or receiving any

telecommunication that can be transmitted through the local dial switch.

Id. at 688-89 (emphasis added). A public payphone line, however, is not dedicated to a single end user. Rather, use of the public payphone line is randomly distributed among those members of the public who happen to require the use of a payphone at a particular location. Accordingly, the Commission concluded that the non-traffic-sensitive ("NTS") costs of payphone lines should be recovered by usage-based charges rather than by the application of an EUCL charge. Id. at 703-04.

These considerations apply equally to independent public payphones. These public payphones are not offered for the use of the premises owner or any other particular subscriber, but for the use of the general public.^{2/} Accordingly, the policy rationale behind the Commission's "public telephone" exception requires the Commission to amend the rules so that the NTS costs of IPP lines are recovered in the same manner as the cost of LECPP lines.

II. THE RULE CHANGES REQUESTED BY APCC ARE NECESSARY TO ELIMINATE DISCRIMINATORY APPLICATION OF ACCESS CHARGES.

The LECs' practice of assessing EUCL charges on IPPs but not LECPPs is blatantly discriminatory against IPP providers and undeniably harms competition in the pay telephone industry. This

^{2/}By contrast, in other situations where EUCL charges apply to lines connected to telephones used by transient end users, e.g., "semi-public" telephones and telephones in hotel and hospital rooms, the phones are available for private as well as public use. For example, semi-public telephones may have extensions added for the exclusive use of the location owner. The same is true for hospital and hotel telephones connected by a private branch exchange ("PBX").

practice frustrates one of the basic objectives of the access charge rules -- the elimination of "unreasonable discrimination" or "undue preferences." Access Charge Order, 93 FCC 2d at 257, 265. It is also contrary to the non-discrimination provision of Section 202 of the Act, 47 U.S.C. § 202 -- a principle that is fundamental to common carrier regulation.^{8/}

The Commission did not purposely create this discrimination; competition in the payphone industry did not exist at the time the access charge rules were adopted. But now that the competitive environment has changed, the rules must change as well. When the circumstances originally justifying a rule have changed, the Commission is bound to either rescind the rule or modify the rule to be consistent with the new reality. Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979); Bechtel v. FCC, 957 F.2d 873, 881 (D.C. Cir. 1992).^{2/} The Commission simply cannot allow its rules to

^{8/}As the U.S. Court of Appeals for the District of Columbia Circuit has explained, "the prohibition [of Section 202(a)] against different charges to different customers for like services under like circumstances is flat and unqualified." American Trucking Association v. FCC, 377 F.2d 121 (D.C. Cir. 1966). It is well settled that the Commission may not adopt rules that are contrary to the Act. MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223 (1994). If for no other reason, therefore, the Commission must amend its access charge rules to be consistent with Section 202 of the Act.

^{2/}Cf. WAIT Radio v. FCC, 418 F.2d 1153 (1969), a landmark case addressing the Commission's need to address rule waivers:

[a] general rule, deemed valid because its overall objectives are in the public interest, may not be in the "public interest" if extended to an applicant who proposes a new service that will not undermine the policy served by the rule. . . .

(continued...)

sanction discriminatory conduct that is perverse to the most fundamental principles of its access charge rules and the Act.

III. THE RULE CHANGES REQUESTED BY APCC WILL NOT PREVENT EXCHANGE CARRIERS FROM RECOVERING THE INTERSTATE COSTS OF PAYPHONE LINES.

A rule change will not prevent local exchange carriers from recovering the NTS costs of IPP lines which are currently being assessed EUCL charges. Under the access charge rules, the NTS costs of LECPP lines are recovered by means of the CCL charge.

Investment in IPP lines, like LECPP lines, can continue to be assigned to the common line element. 47 C.F.R. § 69.304. The rules provide that any portion of the common line revenue requirement which is not to be recovered via EUCL charges and special access surcharges can be assigned to the carrier common line element and recovered via carrier common line charges. 47 C.F.R. § 69.502. Thus, while the rule change that APCC requests would require the LECs to cease recovering the NTS line costs of IPP lines via EUCL charges, the LECs can nonetheless recover such costs via CCL charges, which are already being used to recover NTS costs of LECPPs.

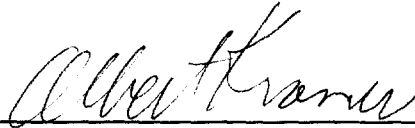
^{2/}(...continued)

Id. at 1157. As discussed above, the extension of the EUCL charge rule to IPP providers is clearly contrary to the public interest. Therefore, the Commission should correct the current inequity by changing the rule.

CONCLUSION

As explained herein, the access charge rules should not authorize recovery of the NTS costs of IPP lines in a different manner when the public payphone is provided by a competitor than when it is provided by a LEC. Further, the underlying policy considerations are the same for both types of public payphones. Accordingly, the Commission should amend its rules so that EUCL charges are inapplicable to IPPs just as they are inapplicable to LECPPs.

Respectfully submitted,



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ATTACHMENT 1

Revised 47 C.F.R. § 69.2(m) and (ee)

(Underlining indicates added material)

(Brackets indicate deleted material)

(m) . . . provided, that a person or entity owning or operating a public telephone shall not be deemed to be an "end user" with respect to lines used exclusively for public telephone service.

(ee) *Public Telephone* is a telephone [provided by a telephone company] through which an end user may originate interstate or foreign telecommunications for which he pays with coins or by credit card, collect or third number billing procedures.